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IN THE

Supreme Court of the United States

October Term, 1971

No. 72-392

RICHARD CRAMER and GWENDOLYN S. CRAMER,
Petitioners

v.

DIRECTOR OF REVENUE
(Formerly State Tax Commissioner)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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INDEX

	Page
Opinions Below	1, 2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	8
Appendix A (Opinion of the Supreme Court of the State of Delaware)	9
Appendix B (Opinion of the State Tax Board of the State of Delaware)	10

TABLE OF CITATIONS

Cases:

Shaffer v. Carter, 252 U.S. 37 (1920)	6, 7
Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920)	6

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The Petitioners, Richard Cramer and Gwendolyn S. Cramer pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Delaware rendered in these proceedings on June 12, 1972.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware, as yet unreported, appears at Appendix A, pp. 12-13 *infra*. The Superior Court of the State of Delaware, in and for Newcastle County, issued no written opinion.

The opinion of the State Tax Board of the State of Delaware is reported at 1 Del. Tax Cases ¶200-197, and appears at Appendix B, pp. 14-20 *infra*.

JURISDICTION

The final order or judgment of the Supreme Court of the State of Delaware was entered on June 12, 1972. See Appendix A, p. 12 *infra*. This Petition for Certiorari was filed less than ninety days from the date aforesaid. Jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether a state constitutionally may tax the income of non residents derived from personal services rendered in their state of residency on behalf of an employer located in the taxing state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the protection of the laws.

30 Del. Code, §1101, par. 7, states in pertinent part:

"The tax commissioner shall make rules, regulations and decisions not inconsistent with this title . . ."

STATEMENT OF THE CASE

Petitioner, Richard Cramer, is a research chemist employed by the DuPont Company in the State of Delaware on a salaried basis. His residence and domicile have, at all times pertinent hereto, been in the Commonwealth of Pennsylvania. Petitioner, Gwendolyn S. Cramer is joined as a party petitioner by virtue of her having filed joint income tax returns with Richard Cramer, the income which is the subject matter of this dispute having been earned solely by him.

For more than ten years, Richard Cramer has been crippled and moved about with difficulty with crutches. Because of his physical infirmity, he must of necessity, perform a substantial amount of work at his home in Pennsylvania, although he is not required to do so by his employer. As a result of working in this manner, Petitioner allocated a portion of his salary each year to work done in Pennsylvania and did not pay Delaware income tax on these sums so allocated.

The instant action arose out of a deficiency assessment in Petitioners' Delaware Income Tax return for 1962 in the amount of $507.92, and for 1963 in the amount of $601.75. These deficiencies were assessed when the Delaware State Tax Commission refused to credit Petitioner for the time worked outside the State of Delaware. Petitioners appealed to the State Tax Board which held, after hearing, that they should be given credit against the Delaware tax only for the services rendered on ordinary working days at the direction of or with the permission of the employer and could not be given credit for services performed in the evenings, on weekends and holidays, or work performed on days on which he was on paid sick leave status or vacation. The Board further ruled that Petitioner was not entitled to credit for any hours worked in excess of eight hours in any working day. See Exhibit B, *infra*, pp. 19-20. On appeal, the decision of the State Tax Board was affirmed by the Superior Court of the State of Delaware,

without opinion, and reaffirmed on appeal to the Supreme Court of Delaware, which adopted the opinion of the tax board. See Exhibit A, pp. 12-13 *infra*.

The decisions of the Delaware Courts and its Tax Board subject petitioners to the payment of income tax to the State of Delaware on income that arose out of services carried out in the Commonwealth of Pennsylvania. It is undisputed that petitioner must, of necessity by virtue of his physical condition, perform a substantial portion of his work at his residence, which is without the taxing jurisdiction.

Constitutional questions pressed in this Petition have been consistently raised by Petitioners throughout the proceedings. See Appendix B, *infra* p. 16. Neither the tax board nor the appellate court of the State of Delaware treated the constitutional questions in their decisions.

REASONS FOR GRANTING THE WRIT

The decisions below directly conflict with the well settled constitutional principle established by this Court that a state may tax only that portion of the income of a non resident which was earned within the taxing state or had its source within the taxing state.

The well-established-rule of *Shaffer v. Carter*, 252 U.S. 37 (1920) and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) is that a state may tax the income of non residents which accrues within that state. The converse of that principle, equally well established, is that a state is without jurisdiction to tax the income of non residents which is earned in another state. The rule laid down in *Shaffer, supra* is that:

> just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character and not more onerous in its effects, upon incomes accruing to non residents from their property or business within the said state or their occupation carried on therein, enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders.

Id., at 52 [*emphasis added*]. In *Travis, supra* it was held that a state may impose a tax upon the income of non-residents, "arising from a business, trade, profession or *occupation carried on within its borders* . . ." Id., at 75 [*emphasis added*].

It is with this basic principle that the decisions below can not be squared. In this case it has been proven that petitioner performed a substantial amount of labor in Pennsylvania, not from personal convenience or a desire to escape taxation by the State of Delaware, but out of necessity caused by physical disability. His was, "an occupation carried on within" the borders of Pennsylvania, not

of Delaware, which physically could not be performed in Delaware.

The fact that petitioners services were not required by his employer to be performed within Pennsylvania has no bearing upon the constitutional principles involved:

> This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any questions raised by the federal constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed.

Schaffer v. Carter, 252 U.S. at 55 (citations omitted).

The practical effect of the decision below is to impose a tax upon the income attributable to services performed outside of the taxing jurisdiction by a non resident. This result is achieved by treating him in a manner substantially different from that which would be accorded an hourly employee. As a salaried employee, petitioner is paid for his total effort on behalf of his employer, whether or not the greater portion of his efforts are situated in Delaware or in Pennsylvania. Hypothetically, if petitioner was able to achieve his total work product solely by working at home on weekends, holidays and vacation periods and during sick leave, as well as "overtime" on some working days, the formula applied by the tax board and affirmed by the appellate court of Delaware would result in the taxation of a large portion of that income as if it had been derived from services rendered in Delaware. Such an interpretation flaunts the constitutional principles cited. The state would simply be taking advantage of the naked nexus established by the employer's location within its bounds.

The failure of the Delaware Courts to allocate a proper portion of Petitioner's income for services performed in Pennsylvania is constitutional error and deprives petitioner of the due process and equal protection of the law

afforded him by the fourteenth Amendment to the Constitution of the United States. This decision jeopardizes the constitutional rights of all non residents of Delaware who work for Delaware employers and sets a precedent which might be followed by other jurisdictions in enacting income tax laws, making it incumbent upon this court to enunciate guiding principals to those states which will attempt to tax the income of non residents.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Delaware.

Respectfully submitted,

LICHTENFELD & GALLAGHER

By: WILLIAM J. GALLAGHER
MICHAEL B. KEAN

APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

RICHARD CRAMER and
GWENDOLYN S. CRAMER, *Appellants*

v. No. 73, 1971

DIRECTOR OF REVENUE
(formerly State Tax Commissioner), Appellee

(June 12, 1972)

Before WOLCOTT, Chief Justice, CAREY and HERRMANN, Associate Justices:

Upon appeal from Superior Court. Affirmed.

Edward Z. Sobocinski, Wilmington, and William J. Gallagher, Kennett Square, Pennsylvania, for appellants.

Edward J. Wilson, Deputy Attorney General for Division of Revenue, Wilmington, for appellee.

PER CURIAM:

This is an appeal from an affirmance by the Superior Court of the decision of the State Tax Board.

The case arises from an asserted deficiency in the appellants' Delaware Income Tax for 1962 in the amount of $507.92, and for 1963 in the amount of $601.75.

The Superior Court adopted the careful opinion of the State Tax Board. We, too, agree with the reasoning and conclusions stated therein.

Affirmed.

APPENDIX B

STATE TAX BOARD

STATE OF DELAWARE

RICHARD CRAMER and
GWENDOLYN S. CRAMER,
Petitioners

v. Docket No. 305

STATE TAX COMMISSIONER,
Respondent

OPINION AND DECISION

The petitions in these consolidated cases present appeals from the assessment of additional income taxes for the years 1962 and 1963 imposed by the Commissioner upon the non-resident Petitioners by reason of allocation of earnings of Petitioner, Richard Cramer (hereinafter "taxpayer"), from employment in Delaware. The Commissioner refused to credit taxpayer for days worked outside the State of Delaware, much of the time detailed by taxpayer as work at home in Pennsylvania on the business of his Delaware employer.

The petitions, and a Motion for Summary Judgment filed by Petitioners, also raise procedural questions; that is, whether or not the assessment notice was fatally defective, and whether the doctrine of collateral estoppel is applicable against the Commissioner because of a prior proceeding by him to effect collection of taxes assessed for 1960, but not appealed to this Board, based upon the same issues involved in this case.

Heard upon Petition, Answer, Motions and Affidavit, documentary evidence and oral testimony.

C. W. Mortenson, Esquire of Wilmington for Petitioners.

Ruth M. Ferrell, Esquire, Deputy Attorney General, for the State Tax Commissioner.

Before Leroy A. Brill, George L. Townsend* and W. Howard Workman, State Tax Board
BRILL, Chairman:

PROCEDURAL MATTERS

The notices of the deficiencies in this case were issued by the Commissioner and addressed only to taxpayer, Richard Cramer, although the income tax returns for both years were joint returns and were signed by both Petitioners, husband and wife. At the outset we are confronted by the Petitioners' Motion to Dismiss and their Motion for Summary Judgment. We consider the Motion to Dismiss as in reality a part of the Motion for Summary Judgment and as one of the grounds therefor, as we can see no purpose in dismissal of the petition by Petitioners if they contest these taxes, as they certainly do. The Motion for Summary Judgment is based upon two grounds:

(1) The notices of assessment were fatally defective because sent only to the taxpayer and not to both husband and wife; and

(2) The Commissioner is collaterally estopped from proceeding with the assessment of these taxes.

Although joint returns were filed as permitted under our law, the notices of deficiency were addressed and sent only to the taxpayer, the husband, Richard Cramer. The Petitioners reside together.

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*Mr. Townsend has since resigned as a member of the State Tax Board, and did not take part in this decision.

In *DuMais*, 40 T.C. 269, it was held that a separate notice of deficiency for United States income taxes sent to the wife only, where the return was a joint one, was invalid. However, that case was expressly overruled by the Tax Court of the United States in *Marie A. Dolan*, 44 T.C. 420 (1965). The latter case holds that separate notices may be sent to each of the husband and wife, or only to one; but the assessment entered on such a separate notice may be ineffective as to the other, not noticed. *U.S. v. Hammerstein*, 20 F. Supp. 744. Accordingly, we hold that the notices of assessment in these petitions are valid as against taxpayer, Richard Cramer. We have not been requested to grant separately a motion for summary judgment in favor only of Mrs. Cramer, and do not decide whether or not the notices would support valid assessments as against her.

The Commissioner filed suit and a garnishment proceeding in a Magistrate's Court in New Castle County for unpaid income taxes due on the joint 1960 return of these Petitioners. Trial was held upon the voluntary and cooperative appearance of Petitioners before the Magistrate, and resulted in a decision in favor of the Commissioner against taxpayers. However, an appeal *de novo* was taken by Petitioners to the Superior Court. Upon default of the Commissioner, a judgment of dismissal was entered in Superior Court against him and ordering him to pay court costs. As far as we can determine from our record in this proceeding, that resulted in vacating the Magistrate's decision, but specifically decided nothing upon the merits of Petitioners' claim that the taxes were invalidly assessed.

Petitioners show by affidavit supporting their Motion, that the reason they contested the suit to collect the 1960 taxes was the same one involved in this case; that is, that the Commissioner's allocation to Delaware employment of earnings under the formula which he applies in general use under a regulation of the Tax Department was void and unconstitutional in its application to the Petitioners.

For this reason, say the Petitioners, these assessments cannot be enforced by the Commissioner because he is collaterally estopped by reason of the former proceedings.

As we understand the record, the only trial and decision upon the merits of Petitioners' claim of invalidity occurred in the Magistrate's proceeding, but that resulted adversely to Petitioners. Presumably, the effect of the default in the Superior Court action was to set aside the Magistrate's judgment. As we see it, this left the parties in essentially the same posture in which they stood before the Magistrate proceeding, except that it may well be that another action at law by the Commissioner to effect collection of the *1960* assessment would be barred. But this does not affect the Commissioner's right to assess and collect upon the *1962* and *1963* deficiencies, if they are correct. Stated differently, an essential element of collateral estoppel is missing here; that is, a prior decision upon the *merits* (on the same issue) in favor of the party asserting estoppel (Petitioners). See *New Milford Block Co. v. Ericson*, 206 A.2d 487, 3 Conn. Cir. 1 (1964).

Administrative action, such as assessment of a tax upon taxpayer's failure to file a Tax Court petition, cannot be the basis for application of *res judicata*. - *Goldstein v. United States*, 227 F.2d 1. "Collateral estoppel" is but an aspect of the general rule of *res judicata*. - *Bata v. Bata*, 163 A.2d 711, 39 Del. Ch. 258.

Even if the Superior Court dismissal in favor of Petitioners could be considered a complete reversal of the Magistrate and hence a judgment on the merits for Petitioners that the 1960 assessment was void or invalid upon the grounds alleged, the Commissioner is not collaterally estopped from proceeding with the 1962 and 1963 assessments because new facts are involved. The 1960 assessment was made upon the basis of taxpayer's earnings, schedule of hours spent at home in Pennsylvania and allocation of days worked in and outside of

Delaware, all events which happened in that year. Here, his earnings and time allotments concern events occurring in 1962 and 1963, which were not the same as occurred in 1960.** Collateral estoppel cannot apply where new or different facts occur subsequent to the prior litigation. *Commissioner v. Sunnen*, 333 U.S. 591 (1948). In further support, we quote from a decision of the U.S. Tax Court in *Walter Wilson Flora*, 47 T.C. 410 (1956):

> "For the doctrine of collateral estoppel to apply in tax litigation involving different taxable years, the taxpayer must be the same . . . the matter raised in the second case must be identical with the matter decided in the first proceeding, the controlling facts must be the same, and there must have been no change in the applicable legal principles or atmosphere. Where such a situation exists, and a question of fact essential to the judgment in the prior proceeding was actually litigated and determined in the prior proceeding, the parties are bound by that determination in a subsequent proceeding even though the tax year of the taxpayer is different and hence the cause of action is different; also the prior judgment will be conclusive as to the same legal issues involved in the two cases, assuming there is no intervening doctrinal change. Commissioner v. Sunnen, supra."

Accordingly, the "Motion to Dismiss" and "Motion for Summary Judgment" are overruled.

THE ASSESSMENTS

Concerning the merits of this case, taxpayer's claims are substantially the same as those presented before this Board in the case of *McClellan v. State Tax Commissioner*, Docket No. 277, decided by us June 18,

** Transcript, pp. 19, 20.

1965.* In that case we held that as to a nonresident Dupont executive, in circumstances quite similar to those of the Petitioner, his time worked at home on a voluntary basis on weekends, evenings, and when he was confined to a hospital and on sick leave, could not be excluded as days worked in the service of his employer outside the State of Delaware. We adhere to that ruling.

Accordingly, in this case we hold that the Petitioner may not deduct the time worked at his home in Landenburg, Pennsylvania in the evenings or on weekends, nor upon any days on which he was on paid sick leave status. However, he is entitled to fully deduct those days, occurring on regular workdays, when he worked at his home rather than in the laboratory in Delaware, either upon the direction of his employer or with its permission. Due to a physical disability, the taxpayer often worked at home in this fashion, and of course we do not think he should be penalized in any way because of this arrangement.

One further word is needed, however, to clarify the recomputation of his taxes for these years. In keeping his detailed and accurate records of time worked and projects upon which he worked, taxpayer listed his time hourly, totaled up his hours, and obtained the number of working days by dividing total hours by eight. We do not think this is in accordance with the Commissioner's formula, which we have held to be a reasonable one. The taxpayer should actually list the working days upon which he worked, and we understand he is able to do this by reference to his diary and a calendar. For example, taxpayer may not take credit for three working days for each 24 hours of work. On those days upon which he worked at home more than eight hours, the excess is considered a voluntary contribution and falls within the *McClellan* ruling.

Taxpayer asserts an additional point involving the constitutionality of the Delaware law. He complains that he is allowed to deduct only $300 ($600 on the joint

*Appealed to Superior Court. We understand the case is still pending.

returns) as a deduction for Federal income taxes paid,* when in fact his Federal taxes were far in excess of that amount. Being an administrative, quasi-judicial body, this Board must apply the Delaware law as it is written and interpreted by the Courts. We cannot change it; nor may we question its constitutionality, according to the weight of the authorities. See the exhaustive opinion of the District of Columbia Tax Court, Opinion No. 1054, filed December 22, 1965, in the matter of *Paul S. Davids, Petitioner v. District of Columbia, Respondent,* Docket No. 1969.

At the hearing it was agreed that Petitioners' claim for an off-set against any taxes found to be due for these years 1962 and 1963, because of court costs owned to them by the State Tax Commissioner as a result of the 1960 proceedings, can not be considered.

Accordingly, the determination of the State Tax Commissioner is affirmed, except to the extent necessary to correctly calculate the number of days worked outside of Delaware in accordance with this opinion; that is to say, taxpayer should be given credit for all of the days worked at home which were not overtime, Sundays or holidays, and which did not occur during periods when taxpayer was on paid sick leave.

If the parties cannot agree promptly on computation of the exact taxes due, they shall proceed pursuant to Rule 31.

Unless we receive a proposed Order or the parties' computations under Rule 31, earlier, the date of this decision shall be June 1, 1968.

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*30 Del. Code 1118(3).

STATE TAX BOARD

By _____
Leroy A. Brill, Chairman

_____
W. Howard Workman